**Department of Veterans Affairs**

# Memorandum

Date: AUG 30 2000

From: Acting Secretary (00)

Subj: Senior Management Conduct and Performance Issues

To: Administration Heads, Assistant Secretaries, Deputy Assistant Secretaries, and Other Key Officials

1. The attached guidance addresses issues related to performance and conduct problems involving senior managers. Section A sets forth the process to be used when an allegation of serious misconduct involving a senior manager first comes to management's attention.

2. Section B provides instructions regarding proposed actions to address conduct and performance problems that have already been substantiated. This section updates and supercedes the instructions originally set forth in the Assistant Secretary for Human Resources and Administration's memorandum dated March 28, 1997, regarding this topic.

3. Appendices A-C contain information to assist teams assigned to investigate the allegations.

4. This guidance was developed with the assistance of a work group comprised of representatives of a cross-section of VA organizations. The procedures are now in effect, and will be incorporated into VA policy as part of the ongoing strategic initiative to revise and consolidate VA's human resources policies.

5. Please ensure that the guidance is shared with all senior managers and Human Resources Management Officers within your organization. The information is also posted on the Employee Relations homepage located on the OHRM web site at http://vaww.va.gov/ohrm/Employee_Relations/ERpage.html.

6. Questions involving these matters can be referred to the Customer Advisory and Consulting Group (051).

Hershel W. Gober

Attachment

## CONDUCT AND PERFORMANCE PROBLEMS INVOLVING SENIOR MANAGERS

### SECTION A. Allegations of Serious Misconduct Involving Senior Managers

**1. Purpose:** To provide guidance on how VA should respond to allegations of serious misconduct made against senior managers.

**2. Coverage:** Senior Manager includes members of the senior executive service; Associate and Assistant Directors and Chiefs of Staff at VHA facilities; other heads of VA facilities, including national cemeteries, area offices, and regional offices; and all other positions centralized to the Secretary.

**3. Procedures:**

**a. General.** These guidelines are intended to be a framework within which allegations of serious misconduct can be promptly addressed in a fair and objective manner. These guidelines should be applied in a manner that provides sufficient flexibility to tailor the approach to the specific circumstances of each case.

**b. Reporting Requirements.** When a management official becomes aware of an allegation of serious misconduct against a senior manager, the management official will notify the responsible official within the organization that employs the senior manager. (The responsible official is the organization head or other designated official who is higher in the chain of command than the senior manager.) Following a preliminary assessment of the facts and a determination that the allegations are serious, the responsible official will immediately notify the Office of the Assistant Secretary for Human Resources and Administration (HR&A), and the Office of General Counsel (OGC). If the allegation involves discrimination or retaliation for filing a discrimination complaint, HR&A will notify the Office of Resolution Management. The above parties will decide upon an appropriate course of action, which will then be communicated to the Secretary's office. Allegations involving political appointees will be forwarded to the Secretary's office for coordination, as appropriate.

**c. Serious Misconduct.**

(1) Factors that should be considered in determining whether an allegation involves serious misconduct include:

(a) Do the allegations involve potential harm to employees, patients, visitors, or misuse of Government property?

(b) Do the allegations involve sexual harassment, intentional discrimination, or systemic discrimination?

(c) Do the allegations involve whistleblower reprisal or other unlawful retaliation?

(d) Do the allegations involve notorious, egregious, or disgraceful conduct?

(2) **Allegations of Inaction.** Sometimes, an allegation relates to misconduct by someone other than a senior official, but alleges that the senior official allowed the action to persist through lack of, or insufficient, corrective measures. Such allegations may warrant investigation under these guidelines.

(3) The following allegations are generally not covered by these procedures:

(a) criminal misconduct, including fraud. (These allegations should be reported to the Office of Inspector General (OIG) or an appropriate management official; however, the manner in which they are investigated will not be covered by these procedures, since other existing procedures are more appropriate.); and

(b) performance-related matters which should normally be addressed through the applicable performance management process.

(4) **Anonymous Complaints and "No Action" Requests.**

(a) As a general category, anonymous allegations are typically viewed as less credible than when the individual making the allegation is identified. However, reasons for anonymity are understandable, particularly when the allegation is against a senior official. Thus, anonymous complaints should not be dismissed out of hand. Some factors to consider in deciding the course of action that is appropriate for anonymous allegations are listed below:

1 Are the allegations sufficiently specific as to details and events so that they could be confirmed through an inquiry?

2 Have there been similar allegations or complaints against the official in the past?

3 Is there other information or specific documentation available that suggests that the allegations may be accurate?

(b) Especially when an employee alleges sexual harassment, but also in other types of discrimination, the employee may request of the official being contacted that his/her identity not be revealed to the official who is the subject of the complaint. This is sometimes referred to as an anonymous complaint. The complainant should be advised that his/her identity will be protected, but that honoring the request may hinder the Department's ability to investigate and respond to the allegation. The management official should further advise the employee that VA may not honor a complainant's request to take no action, particularly if the alleged misconduct involves allegations of sexual harassment, other similar abuse of the employee, or other serious misconduct.

**d. Responding to Allegations.**

(1) The head of the affected organization, or designee, in consultation with the

Assistant Secretary for HR&A and the General Counsel, will determine whether a team should be constituted under these procedures to conduct an inquiry into the allegation(s). If the matter involves actual or potential Congressional or media interest, the course of action should be coordinated with the Offices of Congressional and/or Public Affairs, as appropriate. Those offices should be kept informed as developments occur.

(2) **Appointment of the Investigating Team.** The Assistant Secretary for HR&A is responsible for appointing team members, authorizing team members to administer oaths, and determining the scope of the inquiry in coordination with OGC and the affected organization. (*Note:* Team members are designated by their respective organizations in accordance with the provisions in paragraph 3e(1), below.) However, team members will be designated by their respective organizations. Appointment letters will be issued to team members with copies to their organization heads. The immediate supervisor of the involved senior official will also be notified. The letters will briefly address the purpose for the investigation and constitute the authority for the team to obtain necessary information. Normally, the team will be on site to begin the review within 2 weeks of its appointment. The Offices of Congressional Affairs and Public Affairs will be notified, as appropriate, when the team is deployed.

(3) **Interim Measures.**

(a) Because of the time required to coordinate actions with all appropriate officials, it may be necessary to take prompt, interim measures, such as when there is an immediate threat to the safety or welfare of employees or patients, or damage to Government property. The immediate supervisor of the senior official about whom the allegations have been made is responsible for taking interim measures to neutralize the situation, such as by a temporary assignment that eliminates the risk of harm. However, those interim measures should be closely coordinated with the Office of Human Resources Management (OHRM) and the Assistant General Counsel, Group III, to the extent practicable. OHRM will coordinate with other organizations, as appropriate.

(b) When there has been an allegation of sexual harassment, the Department must take immediate corrective action, even before investigation is under taken. The corrective action must be designed so that it is sufficient to preclude the possibility of future harassment. Usually, it is sufficient to separate the alleged perpetrator and alleged victim pending investigation, and instruct them to have no contact, but the alleged victim should not be involuntarily detailed or reassigned. Instead, the Department should consult with both parties to attempt to arrive at a solution that is acceptable to both while the allegation is being investigated. It is the right of the alleged victim to maintain anonymity. If the alleged victim should elect to remain anonymous, the Department is nevertheless obligated to take immediate corrective action and proceed with investigation. Implementing officials may seek advice from the Assistant General Counsel, Group IV.

(4) **References.** The Office of the Assistant Secretary for HR&A is responsible for providing the team with relevant laws, regulations, and VA policies and references, e.g., those on EEO retaliation, whistleblower retaliation, misuse of government resources, sexual harassment.

**e. Team Composition.**

(1) Teams will normally be comprised of a representative from OGC, a representative from OHRM or a subject matter expert, and a representative from the affected organization. Representatives will be designated by their respective organizations. The organization representative will not be from the office, network, or region where the senior manager is assigned. In most cases, if the allegation involves discrimination, a representative from the Office of Resolution Management will be assigned to the team, either in lieu of or in addition to the OHRM representative. The diversity of team members should be considered, depending upon the circumstances of the matter under review.

(2) Team members will possess skills that will enable the team to effectively gather and analyze all pertinent evidence and make appropriate recommendations. This includes skills in developing the evidence so that it is of sufficient quality to support any corrective action that might be warranted, and producing a clear, concise written report describing the basis for the team's findings and recommendations.

**f. Findings and Recommendations.** The team shall issue a report which includes its findings and recommendations, signed transcripts and any other evidence gathered and relied upon by the team in making the findings and recommendations. The report shall be given to the Assistant Secretary for HR&A, with copies provided to the organization head and the General Counsel. Generally, the report shall be submitted within 2 weeks after completion of the investigation.

**g. Acting on the Report of Investigation.**

(1) The organization head will consult with the Office of the Assistant Secretary for HR&A, OGC, and the Office of the Secretary in determining what action, if any, is appropriate, and who should propose and/ or make the final decision on the action. (See Section B.)

(2) Allegations of wrongdoing concerning senior officials often involve, or have the potential for attracting, interest by the Congress, the media, and/or the general public. Accordingly, the organization will consult with the Offices of Congressional Affairs and/or Public Affairs, as appropriate, before any actions are taken.

**h. Alternate or Concurrent Processes.**

(1) Use of the procedures contained in these guidelines does not in any way affect an employee's right to seek redress through other existing procedures provided by law, regulation, policy, or negotiated agreement, and the employee should be so informed.

(2) When alternative processes for addressing the allegations of misconduct are available, the organization head should recommend how he or she wants to handle the matter. For example, it might be more appropriate to request the OIG to review allegations of waste, abuse, or reprisal for cooperating with the OIG. There may be advantages to involving another organization, such as the OIG, in the conduct of the review. For example, it might be necessary to obtain evidence not within the Department's control or to ensure that the investigating team has the appropriate expertise.

(3) When an allegation of misconduct is being reviewed, in whole or in part, by another entity with jurisdiction (e.g., Office of Special Counsel or Office of Resolution Management) a separate, concurrent review under these procedures may not be appropriate. However, if a concurrent investigation is conducted, it should be coordinated closely with the other entity to ensure against interference with that entity's authority to review the matter, and to avoid interference with an employee's rights to pursue the matter under other procedures.

(4) In cases involving sexual harassment, other forms of prohibited discrimination or allegations of reprisal for filing a discrimination complaint, the complainant should be informed by the investigating team that the investigation is separate from the EEO process, and that the employee has the right to file an EEO complaint within 45 days of the discriminatory act, by contacting an EEO counselor (or continue to pursue the matter under the EEO discrimination complaint process, if a complaint has already been filed).

**4. Safeguarding Employee Rights.**

**a.** Nothing in these guidelines will be implemented in a manner which would interfere with an employee's rights to due process or other rights provided by law, regulation, or collective bargaining agreement.

**b.** Normally, the confidentiality of employee statements cannot be ensured since the statements oftentimes must be included in evidence files supporting disciplinary action. However, the investigator should inform the employees that they are protected from reprisal for providing information to the investigation team and that they should contact the investigator immediately if they feel that their testimony is leading to improper repercussions. If the matter under investigation is reviewable under the EEO process, the employees should also be advised that if they are subjected to retaliation for providing information to the team, they may also contact an EEO counselor within 45 days to commence an EEO complaint.

**5. Expenses.** The affected organization will pay the costs of the investigation, excluding salaries. However, the Office of the Inspector General and the Office of Resolution Management will continue to fund their own investigations under existing procedures.

**Section B. Proposed Actions Involving Performance and Conduct-Related Problems.**

**1. Purpose.** To provide instructions regarding proposed actions related to conduct and performance problems involving senior managers that have already been substantiated.

**2. Coverage.** These procedures apply to occupants of positions centralized to the Secretary, as well as the following positions at VHA facilities: Associate Directors, Assistant Directors, and Chiefs of Staff.

**3. Procedure.**

**a.** All proposed actions relating to conduct or performance problems involving the occupants of the covered positions will be reviewed in Headquarters by the respective Administration Head, Assistant Secretary, or Other Key Official before they are implemented. These officials will coordinate their review of the proposed action with the Office of the General Counsel and the Office of the Assistant Secretary for Human Resources and Administration. When the review is completed, the Office of the Secretary will be informed of the results. The Offices of Public and Intergovernmental Affairs and Congressional Affairs will be consulted, as appropriate, before clearing the proposal for implementation.

**b.** The following information should be provided with the recommended action in order to facilitate Headquarters review.

(1) Name, title, and grade of the official in question.

(2) A brief summary of the misconduct/performance of the official in question.

(3) Proposed action(s).

(4) Prior performance ratings (within past three years or appropriate period).

(5) Prior discipline/counseling (within past three years).

(6) Strength/weakness assessment of case (brief summary of facts and evidence).

(7) External factors (congressional, media, etc.).

(8) Other significant issues/implications.

**4. Proposed Actions.** Proposed actions include but are not limited to formal disciplinary and adverse actions, reassignments, changes to a lower grade, and details.

**5. Responsibility.** Nothing in these new procedures lessens the responsibility of line officials to promptly review conduct and performance issues and to make recommendations based on the best available evidence.

## TIPS FOR CONDUCTING EFFECTIVE INVESTIGATIONS

This section of the guidelines contains recommendations for conducting effective investigations into allegations of misconduct.

**1. Obtain a clear understanding with the official appointing the team and other team members regarding the scope and issues involved.**

**2. Preparation**

**a.** Complete initial administrative details such as arranging for administrative assistance for setting up interviews; reserving a suitable room; and arranging for court reporter and transcripts.

**b.** Familiarize yourself with the allegation(s).

**c.** Identify relevant policy, regulations, laws, etc.

**d.** Determine what standards might have been violated and what evidence must be obtained in order to determine if a violation occurred. For example, the elements of proof of sexual harassment or whistleblower reprisal are very specific and narrowly defined.

**e.** Determine what evidence, testimony, documentary or physical, would be relevant and material, and what form that evidence should be in - written statement, sworn statement, deposition, etc.

**f.** Determine who else might have information and/or how to identify those individuals. In addition to the names of potential witnesses provided by the individual(s) making the allegations, other potential leads can be identified through the witness interviews, as well as through individuals voluntarily coming forward once they become aware of the investigation. In some unusual cases, it might also be appropriate to publicize the investigation and invite individuals with information to contact the team.

**g.** Determine whether testimony or records sought are subject to any confidentiality requirements, and, if appropriate, consult with the Office of General Counsel before obtaining the evidence to ensure compliance with those requirements.

**h.** Coordinate with bargaining unit representatives, if appropriate.

**3. Maintain impartiality and an open mind.**

**a.** Do not assume that the allegation is true (or false).

**b.** Look for evidence that will substantiate the allegation(s) as well as disprove them.

**c.** Do not accept written statements or memoranda, alone, as the truth.

**d.** Do not assume that the lack of documentation means the allegations are unfounded. Evidence in the form of testimony may be sufficient to prove or disprove an allegation.

**e.** Analyze all statements critically; those that sound like an exaggeration usually are.

**f.** Look for inconsistencies and issues that an interviewee seems to be avoiding or that hint of a hidden agenda.

**4. Prepare for Interviews.**

**a.** Know the file.

**b.** Review all records that pertain to the allegations made.

**c.** Decide the order of interviews to be conducted. Normally the complainant is interviewed first, then witnesses, followed by the senior manager against whom the charges are made. However, see the discussion in Appendix B regarding the Privacy Act.

**d.** Select a quiet, private location for the interview, with no distractions, that is not located in close proximity to the office of the senior manager who is the subject of the investigation.

**e.** Develop a list of questions prior to interviews.

**f.** If there is concern about witness tampering, move quickly and give little or no notice of interviews. However, an action such as this is subject to applicable policy or contract language. Caution interviewees not to discuss the investigation with anyone. The team may request the appointing official or other appropriate official to take any necessary actions to protect witnesses/victims or to otherwise ensure the investigation will be free of interference.

**5. Conducting the Interviews.**

**a.** Establish ground rules regarding the interview process with team members in advance to help ensure it is orderly and effective. Usually it's best to have all of the team members attend each interview. However, there may also be situations where circumstances warrant interviews being conducted by less than all team members, such as when there are numerous interviews and/or evidence gathering requirements that can't otherwise be accomplished within acceptable time frames.

**b.** All testimony should be taken under oath, preferably transcribed and signed.

**c.** Open an interview by introducing yourself, providing your authority to conduct the investigation, and briefly describing the purpose of the interview.

**d.** Explain the witness's rights and responsibilities, and be prepared to explain how his/her statement may be used in the investigation or subsequent disciplinary action. Inform witnesses that they are protected from reprisal for providing information to the investigation team and that they should contact the investigator immediately if they feel that their testimony is leading to improper repercussions.

**e.** Be aware that bargaining unit employees may require special considerations, e.g., their right to union representation.

**f.** Know your options if the employee's representative is disruptive. While the employee and representative may consult, the representative may not answer the questions in behalf of the employee. However, employee union representatives must be permitted to take an active part during questioning. Employees may not refuse to answer questions unless they claim protection from self incrimination under the Fifth Amendment. The Fifth Amendment protection applies only to criminal matters. If an employee continues to refuse to answer questions, you may need to obtain a direct order from the employee's line official.

**g.** Schedule the interviews to allow ample time for each session. Try to put the interviewee at ease. If the witness appears apprehensive, make every effort to alleviate his/her concerns.

**h.** In order to learn all of the facts, it is essential that questions be phrased in a manner that will elicit full explanations. With this in mind, it is generally a good idea to begin the interview by encouraging the employee to explain, in his/her own words, what happened, starting from the beginning. Once the employee has completely related his/her narrative, specific questions may be asked to focus on points in question.

**i.** Ask questions in positive terms. Correct: "Tell me what you heard then." Incorrect: "And, you didn't hear anything else at that point?"

**j.** Discretion should be exercised in interrupting the employee, since it may discourage the employee from recounting the events completely.

**k.** Avoid questions that can be answered by a simple "yes" or "no." Narrowly constructed questions might impede your efforts to learn all of the facts. Also avoid leading questions; you want the witness' information, not just confirmation of information in the question.

**l.** Always ask if there is a way to corroborate the account and be prepared to check leads out and re-interview the person, if necessary.

**m.** Cover all of the bases regarding the event (i.e., who, what, when, where, how, and why). Ask the witness to be specific in describing the incident, even if it entails repeating profanity, or describing/demonstrating inappropriate physical contact.

**n.** Be alert and ask questions about apparent exaggerations, inconsistencies, gaps, etc., whether internal to the interview, or between the interview account and a previous statement. Do not be reluctant to clarify statements if it is necessary to fully develop the facts, even if it might make the person uncomfortable.

**6. Documentation**

**a.** Create a file containing all information pertinent to the investigation. Coordinate, as appropriate, with other offices such as the Inspector General and Security and Law Enforcement to ensure that all pertinent documents and evidence regarding the case have been obtained.

**b.** Prepare a report of the team's investigative activities. Generally, a chronological sequence of significant events is preferable. The report format may vary in order to present the information in the most helpful manner. However, the following areas should be covered:

(1) Authority to conduct the investigation
(2) Purpose, including description of the allegations
(3) Scope of the inquiry
(4) Findings
(5) Exhibits
(6) Conclusions
(7) Recommendations

**c.** The investigative report should not contain terminology or acronyms not readily understood outside of your organization. The case may be referred to the Office of the Special Counsel or other places where such terminology may be unfamiliar.

**d.** The report should be concise and cover the significant issues. Avoid inclusion of extraneous or irrelevant information. However, it is important to include sufficient information so that reviewing officials understand the context in which events occurred as well as any aggravating or mitigating factors. For example, if the versions of events differ or the subject has offered a mitigating explanation, it would generally be appropriate to include that information in the findings.

## EVIDENCE

This is a collection of cases regarding the gathering and use of evidence. Most of the decisions arise from adverse action appeals decided by the Merit Systems Protection Board (MSPB). While the purpose of the investigation is to gather evidence in order to develop appropriate recommendations regarding the allegations of wrongdoing, one possible outcome is the initiation of disciplinary or adverse action based on that same evidence. Thus, the investigator should be aware of applicable decisions regarding evidence. Decisions of the MSPB are not precedential for actions involving employees appointed under 38 USC 7104(1), e.g., chiefs of staff; however, they may still be useful as a guide.

### 1. Admissibility/weight

**a.** Hearsay is admissible. Borninkhof v. DOJ, 5 M.S.P.R. 77 (1981). In considering hearsay, the Board considers:

(1) availability of persons with firsthand knowledge to testify;
(2) whether statements by unavailable parties are signed and sworn;
(3) the agency's explanation for any unsigned, or unsworn statements;
(4) whether the declarants were disinterested, and the statements were routinely made;
(5) consistency and corroboration of statements, both internally and with other evidence;
(6) the presence or absence of contradictory evidence; and
(7) the credibility of the witness at the time of giving the statement attributed to him.

An investigation report will be treated as hearsay and will be given far more weight if all attached statements are signed and sworn and if the investigator who actually conducted the interviews is available to testify. It is appropriate to obtain hearsay evidence during an investigation - it may lead to more direct evidence, or corroborate other evidence. However, every effort should be made to develop direct and first-hand evidence.

**b.** "Character evidence may not be introduced circumstantially to prove the conduct of the witness." Federal Rules of Evidence. Example: the fact that appellant slept on the job before does not prove she did it this time. Such evidence is always useful, of course, and may be admissible as long as you don't say the wrong thing about what it proves. Carrick v. USPS, 67 M.S.P.R. 280 (1995) is the source of the example and further discussion and cites. See also Hawkins v. Smithsonian, 73 M.S.P.R. 397 (1997).

**c.** Entrapment cannot be asserted as an affirmative defense in Board

proceedings, though evidence of entrapment may be relevant to penalty determination. Gallan v. USPS, 48 M.S.P.R. 602 (1991).

**d.** Private notes may be kept by supervisors as memory joggers without becoming Privacy Act records, so long as they are kept private. They may only be converted into use as agency records (and used against an employee) if this is done in a timely way, so that the employee had an opportunity to review and refute them while the information was fresh. In Chapman v. NASA, 682 F.2d 526 (Fifth Cir. 1982), the court found the former employee had a valid Privacy Act claim when two-year-old supervisory notes he had not previously seen were used as a basis for his removal. An appellant citing Chapman would presumably do so under the "harmful error" rule. Also, review relevant union contract provisions and VA policies in this area.

**e.** The Board will not apply the exclusionary rule to bar an agency's use of illegally obtained evidence in Board proceedings. Delk v. Interior, 57 M.S.P.R. 528 (1993). Obviously, agencies should operate within the law in obtaining evidence.

**2. Credibility**

**a.** The Board is not required to discredit a witness's testimony on all issues once that testimony is discredited on one or more issues. Bates v. Justice, 70 M.S.P.R. 659 (1996) citing Pederson v. Transportation, 9 M.S.P.R. 195 (1981). Also see Antonucci v. DOJ, 8 M.S.P.R. 491 (1981); but see also Hawkins v. Smithsonian, cited above. Investigators shouldn't write off any important witness without full inquiry just because he/she may have been caught in a lie or exaggeration on another issue. However, this may be a basis for reviewing the reliability of other testimony.

**b.** "Hillen" factors, for assessing individual and relative credibility: Hillen v. Army, 35 M.S.P.R. 453 (1987). Where it is likely a case will involve disputed testimony and therefore turn on the relative credibility of the witnesses, the investigator should be familiar with the Hillen factors, and look for relevant evidence. The Hillen factors are discussed in greater detail in Appendix C.

**c.** Recanted admissions can be considered along with other evidence. Uske v. USPS, 56 F.3d 1375 (Fed. Cir. 1995).

**3. Intent.** As an element of a charge, intent must generally be proven by circumstantial evidence, and the totality of the evidence must be considered. See Delessio v. USPS, 33 M.S.P.R. 517 (1987) and Johnson v. Army, 48 M.S.P.R. 54 (1991) for helpful illustration.

**4. Conduct of the Investigation.**

**a. Due Process/Representation.** Due process rights attach to administrative adjudications, but not to investigations. The employee, therefore, has no right to

advance notice, Womer v.Hampton et. al. 496 F.2d 99 (1974); or to a notice of charges, Ashford v. DOJ, 6 M.S.P.R. 458 (1981). It has been longstanding practice to allow employees representation by an attorney or other representative in administrative investigations. The right to representation by the union in an investigation that could lead to discipline is afforded bargaining unit employees by 5 U.S.C. § 7114 (a)(2)(B). Also, the provisions of applicable collective bargaining agreements should be reviewed if there will be questioning of bargaining unit employees, because the agreements frequently contain provisions regarding procedures and rights of bargaining unit employees in connection with investigations.

**b. Privacy Act**

(1) The Privacy Act requires agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from the individual "to the greatest extent practicable." 5 U.S.C. § 552a(e)(2); see also Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989). There are certainly circumstances where an investigator will have a legitimate reason to go to others first: see Brune v. IRS, 861 F.2d 1284 (D.C. Cir. 1988). The OMB Privacy Act Implementation Guidelines and Responsibilities list practical factors that should be considered when determining whether to go to others before the employee.

(2) It is fairly standard practice to first interview the complainant(s) and witnesses, which may occasionally be at odds with the Privacy Act. The order of interviews should be made on a case-by-case basis. However, since these investigations involve allegations of wrongdoing against senior managers, a number of factors would generally support a determination that it was impracticable to interview the manager first. Some factors which would support that determination are:

(a) the individual is in a position to influence or coerce subordinates who have an incentive to avoid alienating the manager, thereby increasing the risk of biased testimony;
(b) circumstances are such that it could otherwise compromise the investigation;
(c) frequently there is insufficient specificity and/or the full extent of the allegations is not known until after the complainant(s) and witnesses are interviewed;
(d) it may impede the ability to test the veracity of the subject's responses when interviewed and to compare it to information previously obtained;
(e) the issues usually involve credibility determinations requiring third party verification.

(3) In the context of an investigation that is seeking objective, unalterable information, the Privacy Act might require the agency to first attempt to gather the information from the subject. This might be the case in the situation where production

of a document could resolve the matter. VA policies, MP-5, part I, chapter 752, paragraph 7a(1), "Disciplinary and Adverse Actions," and MP-5, part II, chapter 8, VHA Supplement, paragraph 8.06a(1)(b), "Disciplinary and Grievance Procedures," require the fact finder to obtain information from the employee who is the subject of the inquiry (although it doesn't specify the order of interviews.)

(4) The Privacy Act only applies when the investigation file is retrieved by an individual's name or other individual identifier.

**5. Self-incrimination**

**a.** VA Regulation 38 CFR 0.735-12(b) states, *"Furnishing Testimony. Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be ground for disciplinary action. An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be or is involved in a violation of law wherein there is a possibility of self-incrimination."*

**b.** If a witness is compelled to give testimony or risk losing his or her job, the agency cannot use the testimony (or evidence suggested or derived in some way from the testimony) in any criminal proceeding. The lead case is Garrity v. State of New Jersey, 385 U.S. 493 (1967). However, an employee who is assured the agency will not make use of testimony in any criminal action may not refuse to answer with impunity. Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973), and Weston v. HUD, 14 M.S.P.R. 321 (1983). In general, if there is any possibility of criminal action for the conduct in question, you must clear a decision to compel testimony through the Office of General Counsel.

**c.** Employees may be charged with false denials of misconduct, and agencies may use them in penalty determinations and for impeachment purposes. LaChance v. Erickson, - U.S. --- (1998), No. 96-1395. With this unanimous and speedy decision, the Supreme Court reversed decisions from the Federal Circuit which had endorsed the MSPB's holdings to the contrary.

This Appendix was adapted from a paper developed and presented at the OPM 1998 Symposium on Employee and Labor Relations.

## CREDIBILITY

In making credibility determinations, the Merit Systems Protection Board identified a number of factors that administrative judges should consider and address, Hillen v. Dept. of Army, 35 MSPR 453 (1987). An excerpt from that decision is set forth below because it may provide a useful framework in which investigators can resolve credibility issues.

To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination. These include: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

**1. The Opportunity and Capacity to Observe the Event or Act.** Personal knowledge of the event or act at issue is an essential qualification of a witness, and the requisite personal knowledge is established by evaluation of the witness's opportunity, as to place, time, proximity, and similar factors, to observe the event or act in issue. 3A Wigmore on Evidence 1005(f) (Chadbourne rev. 1970). These factors relating to a witness's opportunity to observe are material in determining the witness's credibility. Id. See, e.g., Pitchford v. Department of Justice, 14 M.S.P.R. 608, 612-13 (1983) (the administrative judge erred by not crediting witnesses who were close enough to the disputed events to know that a verbal exchange between the appellant and his superior did not occur). The witness's capacity to observe refers to his or her ability to understand what was seen and intelligently narrate it. 3A Wigmore on Evidence 993 (Chadbourne rev. 1970). See, e.g., Wright v. Department of Transportation, 24 M.S.P.R. 550, 553 (1984) (the appellant's version of a meeting was credible because it was based on contemporaneous notes made immediately after the meeting).

**2. Character.** Character evidence may be used for impeachment of a witness on the theory that certain characteristics render that person more prone to testify untruthfully. 3 Weinstein's Evidence, para. 608(01) (1985). This form of impeaching evidence may be established by prior misconduct or reputation. See, e.g., Stewart v. Office of Personnel Management, 8 M.S.P.R. 289, 297 (1981) (previous falsification diminishing credibility); Pedersen v. Department of Transportation, 9 M.S.P.R. 195, 198-99 (1981) (poor reputation for truthfulness diminishing credibility).

**3. Prior Inconsistent Statement.** The effect of a prior inconsistent statement is not that the present testimony is false but that the very fact of the inconsistency raises

doubt as to the truthfulness of both statements. 3 Weinstein's Evidence, para. 607(06) (1985), quoting McCormick on Evidence, 34 (1954). The form of the inconsistency, whether oral, in writing, or by conduct, is immaterial and the statements or conduct need not be in direct conflict. 3A Wigmore on Evidence 1040(1), (2), and (5) (Chadbourne rev. 1970). See, e.g., Greco v. Department of Transportation, Federal Aviation Administration, 15 M.S.P.R. 210, 215 (1983) (failure of the appellant to deny the charges when responding to the proposed adverse action makes a subsequent denial less credible); Schaefer v. Department of Justice, 25 M.S.P.R. 277, 281 (1984) (it is not error for an administrative judge to accord little weight to an affidavit inconsistent with two prior statements by the witness). Inconsistencies, however, do not necessarily render testimony incredible. See, e.g., Cochran v. Department of Justice, Immigration and Naturalization Service, 16 M.S.P.R. 343, 347 n.2 (1983) (inconsistencies found to be inadvertent).

**4. Bias.** The possibility of bias is always significant in assessing a witness's credibility. Bias rests on the assumptions that certain relationships and circumstances impair the impartiality of a witness and that a witness who is not impartial may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties. Weinstein's Evidence para. 607(03) (1985). The trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness, so that in the light of his or her experience, he or she can determine whether a mutation in the testimony could reasonably be expected as a possible human reaction. Id. See, e.g., Paniagua v. General Services Administration, 23 M.S.P.R. 229, 233 (1984) (the attempt of the appellant's estranged wife to have him fired and her unjustified accusations that the appellant engaged in theft, lying, and various other improprieties leads to questioning of her credibility); Bowers v. United States Postal Service, 3 M.S.P.R. 562, 564-65 (1980) ( the administrative judge's failure to consider evidence that the agency had coerced at least one witness and the impact of coercion on the credibility of all the witnesses was error).

One aspect of bias is the question of self-serving testimony. Although the fact that a witness's testimony may be self-serving does not by itself provide sufficient grounds for disbelieving that testimony, it is a factor for consideration in assessing the probative weight of the evidence. See Spezzaferro v. Federal Aviation Administration, 807 F.2d 169, 173 n.2 (Fed. Cir. 1986); Sanders v. United States Postal Service, 801 F.2d 1328, 1332 (Fed. Cir. 1986); Hall v. Veterans Administration, 7 M.S.P.R. 161, 162-63 (1981).

**5. Contradiction by or Consistency with Other Evidence.** Contradiction is the calling of one or more witnesses who deny the fact or facts asserted by another witness and maintain that the opposite is the truth; the contradiction in itself does nothing probatively unless the contradicting witness or witnesses is believed in preference to the first witness. 3A Wigmore on Evidence, 1000 (Chadbourne rev. 1970). Contradiction rests on the inference that if a witness is mistaken about one fact, he or she may be mistaken about more facts and therefore his or her testimony is untrustworthy. 3 Weinstein's Evidence, para. 607(05) (1985). See, e.g., Seavello v. Department of the

Navy, 4 M.S.P.R. 155, 157 (1980) (testimony that witness retrieved illegally produced posters from a beauty shop was discredited by contradictory testimony of present and former owners of the shop). But see Glenroy Construction Co. Inc. v. NLRB, 527 F.2d 465 (7th Cir. 1975) (merely because a witness is not contradicted, it does not necessarily mean that his or her testimony is to be credited); Antonucci v. Department of Justice, 8 M.S.P.R. 491 (1981) (discrediting of a witness on one issue does not require the administrative judge to discredit the witness on all other issues).

On the related topic of polygraph evidence, the Board has previously stated that the admissibility of polygraph results is a matter within the authority of the administrative judge. See Meier v. Department of Interior, 3 M.S.P.R. 247, 253 (1980). In finding polygraph results admissible, the Board does not imply that the results of such a test must be accepted into evidence. Id. Compare, United States V. Gordon, 688 F.2d 42, 45 (8th Cir. 1982) (it was not an abuse of discretion for a trial court to exclude the results of one exculpatory and one inconclusive polygraph examination).

**6. Inherent Improbability.** Inherent improbability relies on the trier of fact's evaluation of the likelihood of the event occurring in the manner described in the testimony. See Meyer v. United States Customs Service, 18 M.S.P.R. 545, 546 (1984) (improbable that appellant, a special agent trained in criminal investigations, received government property from the custodian of the property at its storage facility without knowing that it was government property); Cochran v. Department of Justice, Immigration and Naturalization Service, 16 M.S.P.R. 343, 348 (1983) (improbable that the witness would run the risk of fabricating a statement when he knew that his memorandum would have to clear two levels of supervision).

**7. Demeanor.** Demeanor constitutes the carriage, behavior, manner, and appearance of a witness during testimony. Dyer v. MacDougal, 201 F.2d 265, 268-69 (2d. Cir. 1952). Assessment of demeanor depends upon direct observation of the witness during his or her testimony, and, therefore, necessarily depends on demeanor findings made by the administrative judge. See Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133 (1980), aff'd., 669 F.2d 613 (9th Cir. 1982).

**(Sample Appointment Memorandum)**

**Department of Veterans Affairs** **Memorandum**

Date:

From: Assistant Secretary for Human Resources and Administration (006)

Subj: Administrative Investigation

To: (Names of team members)

1. You are hereby appointed to an Investigation Team to conduct a thorough investigation into an allegation that (name), (position title) ( state generally the nature of the conduct, e.g., sexually harassed a subordinate employee.)

2. This memorandum authorizes you to investigate all aspects of this complaint; require employees to cooperate with you; require all employees having any knowledge of the complaint to furnish testimony under oath, without a pledge of confidentiality; obtain sworn testimony from other individuals with knowledge of the complaint; and gather any other evidence that you determine is necessary and relevant.

3. Advance preparations for the investigation should begin immediately and on-site investigation should begin within (normally 2 weeks) of the date of this memorandum. You should submit a complete report, including your findings and recommendations to me by (normally within 2 weeks of the conclusion of the investigation), with a copy to (organization head).

4. Travel expenses will be paid by (organization employing the involved senior official).

(Signature)